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Docket No.

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
ex rel. WILLIAM DEVLIN,
ROD KODMAN,

Petitioners - Appellants,

v.

STATE OF CALIFORNIA;
COUNTY OF MARIPOSA;
and TOM ARCHER,

Respondents - Appellees.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a non-opportunistic *qui tam* relator must qualify as an "original source" under subsection "B" of 31 U.S.C. §3730 (e)(4) to overcome the jurisdictional bar of that statute without a prior determination that the relator's action is barred because it is "based upon" publicly disclosed "allegations or transactions" as found in subsection "A" of that statute where the relator is the first person to disclose the allegations, transactions, and facts underlying his eventual suit to both the government and the media prior to filing suit and where the relator did not derive any allegation or information of fraud, in any part, from any publicly disclosed allegation, transaction or information.

II. Whether in the confidential arena of federal welfare funding claims by state and county governments, a non-opportunistic *qui tam* relator who learns of systematic county and state government welfare funding fraud through both verbal information and through examining documents from the same county social worker who willfully perpetrated the fraud on the Federal treasury has "direct" knowledge of the information on which his allegations are based so as to be an "original source" under the *qui tam* provisions of 31 U.S.C. §3730 (e)(4)(B) thus entitling the relator to relief from the jurisdictional bar of the statute where the relator also has "independent" knowledge of the information on which the allegations are based and where upon discovery, the relator is the first to report the past and continuing fraud to the government while not deriving any allegation of fraud, in any part, from any publicly disclosed allegation, transaction, or information prior to filing suit.

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PETITION FOR WRIT OF CERTIORARI

Private citizen relators William Devlin, and Rod Kodman, hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 84 F.3d 358 (9th Cir. 1996), and is reprinted at Appendix A. It affirmed the decisions of the United States District Court, Eastern District of California, No. CV-F-92-5086-REC, and are reprinted at Appendix B.

JURISDICTION

The Court of Appeals entered judgment on May 24, 1996. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Federal jurisdiction in the District Court was asserted under Title 31 U.S.C. § 3729, *et seq.*

STATUTE INVOLVED

The False Claims Act, 31 U.S.C. § 3730(e)(4) provides in pertinent part:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit or investigation, of from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

This is an action brought under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (hereinafter "FCA"), which permits private individuals, as *qui tam* plaintiffs or relators, to bring a civil action for the individuals and for the United States to recover funds from a "person" who has presented fraudulent or false claims for payment to the Government.

Petitioners William Devlin (hereinafter "Devlin") and Rod Kodman (hereinafter "Kodman") are private citizens of the United States. Stanley S. Sidicane, the remaining relator named in this action is now deceased.

On December 13, 1991, William Cotey (hereinafter "Cotey") a Mariposa County social worker telephoned Kodman and informed Kodman that Cotey had systematically falsified past and then current social services statistics for the sole purpose of increasing Mariposa County's federal funding. Cotey alleged that his direct supervisor, Tom Archer, encouraged him to do so. Kodman and Devlin met Cotey for the first time and in person on that same day at which time Cotey reiterated that he had inflated case report statistics and created false case files.

On December 18, 1991 and December 23, 1991, Kodman contacted his Congressman, Gary Condit's office, informing Condit's staff of the alleged fraud.

On January 6, 1992, Kodman telephoned the Fresno office of the Federal Bureau of Investigation and discussed the alleged fraud with Special Agent Jim Hyndman.

During the week of January 13, 1992, Devlin again met with Cotey to discuss the alleged fraud.

On January 21, 1992, Kodman received a letter from Cotey stating that Cotey had been directed to falsify Child Protective Service records to increase federal funding and that he had, in fact, done so.

January 21, 1992, Kodman caused copies of allegedly falsified documents and Cotey's January 21, 1992 letter to be forwarded to Congressman Condit's office. Kodman also sent a copy of the documentation and letter to California Assemblyman Sal Cannella.

On January 22, 1992, Kodman delivered a copy of the same Cotey letter and documentation to the to Federal Bureau

of Investigation and, also, to California Assemblyman Jim Costa.

January 23, 1992, Kodman sent the same letter and documentation from Cotey to Governor Pete Wilson of California. That same day, Kodman also wrote to Congressman Condit requesting that Cotey's letter and the other documentation of fraud be delivered to 1) Congressman Bob Wise, Chairman of the House Government Operations Subcommittee, 2) the United States Inspector General and 3) the U.S. Accounting Office to initiate an investigation.

On January 27, 1992, Kodman wrote directly to Representative Bob Wise sending the same Cotey letter and documentation to instigate an investigation.

On January 28, 1992, Kodman wrote to the California Auditor General, Kurt Sjboerg, requesting an investigation of the alleged fraud.

On January 31, 1992, Kodman received a letter from the California Auditor General's office stating "[b]ecause the improper activities you describe are taking place at the local level, we do not have jurisdiction to conduct an investigation under the Improper Activities Act. Therefore, we cannot conduct an audit upon your request."

On February 3, 1992, Kodman wrote to Congressman John Doolittle regarding the alleged fraud, requesting him to deliver copies to Congressmen Bob Wise and John Dingle, as well as the U.S. Inspector General, the General Accounting Office and the U.S. Department of Health and Human Services.

On February 3, 1992, Kodman also wrote to Congressman John Dingle, Chairman of the House Subcommittee on Oversight and Investigation regarding the alleged fraud sending Cotey's letter and the supporting documentation again to also be forwarded to the General Accounting Office and the Department of Health and Human Services.

On or about January 31, 1992, Devlin and Kodman provided some information about the alleged fraud to a reporter for the *Mariposa Gazette*. Devlin subsequently also met with Cotey and the same reporter to discuss more details of their allegations.

On February 5, 1992, Kodman received a letter from Michael Lynch, Chief-of-Staff to Congressman Gary Condit stating that the "...federal government's role...was to provide a funding source that passes funds to the states which then passes them to the various counties. The federal government is not the regulatory agency in this area." The letter also indicated that no more action by the Congressman was appropriate at that time and that none of Kodman's documentation would be passed along to anyone.

On February 6, 1992, the *Mariposa Gazette* then published an article mentioning alleged creative record-keeping by Mariposa County social services regarding inflated federal funding statistics.

On February 11, 1992, Devlin and Kodman filed an action in *pro per* under the *qui tam* provisions of the FCA. Their complaint alleged that beginning in 1990, the Social Services Department of Mariposa County, California, at the direction of Tom Archer began to systematically and fraudulently increase Mariposa County's federal funding for Child Protective Services by instructing social workers to inflate statistics and create false case files thereby creating fraudulent claims. The suit also alleged that the State of California and its officials failed to take any action to investigate, reclaim or repay the monies fraudulently and unlawfully received, acting in deliberate ignorance of the truth or falsity of the information given to them and acting in reckless disregard of the truth or falsity of the information provided by Kodman and Devlin.

The Government filed a Notice of Declination of Appearance.

Mariposa County and Archer moved to dismiss this action on the ground that the District Court did not have subject matter jurisdiction pursuant to section 31 U.S.C. §3730(e)(4)(A) and (B). The State of California joined in the motion to dismiss.

On July 19, 1993, the United States District Court for the Eastern District of California granted the motion to dismiss, holding that the statute divested the court of jurisdiction because "none of the relators have shown that they are [sic] original source of the information within the meaning of Wang." (App. B, 47)

The District Court on July 26, 1993, corrected its Order Dismissing Action for Lack of Subject Matter Jurisdiction filed on July 19, 1993, *nuc pro tunc*, to correct the sentence at lines 25-26 on page 3 and lines 1-2 on page 4. The District Court also corrected the sentence on lines 2-4 at page 5. (App. B, 47)

The relators filed a Motion for Reconsideration of the District Court's order dismissing the action for lack of subject matter jurisdiction. The relators argued that the intent of §3730 (e)(4)(A) of the FCA is to bar persons from filing suit "based upon" information they obtained from a public source such as a newspaper and that the FCA was never intended to bar the action of persons who had knowledge of the fraud prior to public disclosure.

For strategic reasons, the relators did not fully disclose the extent of the documentary evidence in their possession. Consequently, the relators attached as exhibits to their Motion for Reconsideration, a letter from Cotey to Kodman, copies of ledger cards and time sheets used by Cotey to show fraudulent work for which the United States was billed. Kodman also included his declaration stating that these documents were in the relators' possession long before the publication of the newspaper article in the *Mariposa Gazette*. These documents set out specific instances of fraud not contained in the newspaper article showing specific files that were falsified by Cotey.

On September 2, 1993, the District Court denied the relators' Motion for Reconsideration concluding that "[t]his newly provided information is no different than that provided to the court by the relators in connection with the Motion to Dismiss. Therefore, this information in no way causes the court to reconsider its ruling." (App. B, 49)

The Ninth Circuit affirmed the judgment of the District Court's dismissal of the relators' complaint for lack of subject matter jurisdiction on May 24, 1996. (App. A, 28)

ARGUMENT FOR GRANTING THIS PETITION

I. THIS COURT SHOULD RESOLVE THE DIRECT CONFLICT AMONG THE CIRCUITS REGARDING WHETHER THE JURISDICTIONAL BAR OF 31 U.S.C. §3730 (e)(4) REQUIRES A TWO-STEP OR THREE-STEP ANALYTICAL APPROACH CENTERING ON THE MEANING OF "BASED UPON."

A. Different Analytical Approaches To Construing The Statute Are Used Among The Circuits.

Legislators who drafted, sponsored, and approved the 1986 amendments to the FCA intended to encourage and increase the number of potential *qui tam* plaintiffs who will step forward to disclose instances of fraud on the federal treasury. As was recorded at the time of the 1986 amendment,

> [t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits. S.Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), U.S.Code Cong. & Admin.News 1986, pp. 5266, 5288-5289.

In an effort to ostensibly effectuate this legislative intent, United States Circuit Courts have created many analytical approaches to when a *qui tam* plaintiff must qualify as an "original source" under subsection "B" of the FCA any time the allegations contained in the plaintiff's complaint are publicly disclosed prior to filing suit.

In the 1994 case of *United States ex rel. Siller v. Becton Dickinson and Co.*, 21 F.3d 1339 (4th Cir. 1994) *cert. denied*, 115 S. Ct. 316, the court at page 1348 noted that the Circuit Courts are at odds as to when and how a prior public disclosure of the allegations contained in a *qui tam* plaintiff's subsequent complaint require "original source" analysis. In some Circuits, the court must determine whether a plaintiff qualifies as an "original source" because such prior publication would presumptively otherwise bar the action. In other Circuits, a plaintiff may proceed if the allegations of the plaintiff's complaint are not "derived from" publicly disclosed allegations such as when a qui tam plaintiff is ignorant of such disclosure or when the plaintiff was the source of the public disclosure in the first place.

"Bright line" rules of construction have eluded the courts in this area of the FCA. However, a three-step jurisdictional test has emerged in some Circuits while other Circuits have opted for a two-step approach.

For instance, the 11th Circuit in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) announced that the following

> . . . **three part inquiry** determines if jurisdiction exists: (1) have the allegations made by the plaintiff been publicly disclosed; (2) if so, is the disclosed information the basis of the plaintiff's suit; (3) if yes, is the plaintiff an "original source" of that information. See, e.g., *Williams*, 931 F.2d at 1500, n.12. [emphasis added] *Cooper* , *supra*, 565, n.4

The 5th Circuit Court in *Federal Recovery Services, Inc., v. U.S.*, 72 F.3d 447 (5th Cir. 1995) later approvingly cited the standard set forth in *Cooper*. However, the court did not

quote *Cooper's* verbiage exactly. Instead, the court stated that the test must follow the statutory framework and is

> 1) whether there has been a "public disclosure" of allegations or transactions, 2) whether the qui tam action is "based upon" such publicly disclosed allegations, and 3) if so, whether the relator is the "original source" of the information.

Although *Cooper* and *Federal Recovery Services* present different verbiage regarding the test, a three part test has emerged that emphasizes the need to determine whether publicly disclosed information "was the basis of the plaintiff's suit" as is noted in *Cooper*. When the court in *Federal Recovery Services* approvingly cited *Cooper* in this regard, the court emphasized the "based upon" language of subsection "A" of the statute. Thus, reinforcing the need for independent analysis of the "based upon" question as a separate step in the jurisdictional analysis.

The 4th Circuit in the 1994 case of *Siller* even more forcefully emphasized the need for giving "based upon" some independent analysis prior to making a *qui tam* plaintiff qualify as an "original source". The *Siller* court absolutely rejected the analysis of the 2nd Circuit's holding in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992).

At page 1348, the *Siller* court quoted *John Doe* as holding that an action

> is "based upon" a public disclosure where the relator's allegations are "the same as those that ha[ve] been publicly disclosed . . . . regardless of where the relator obtained his information." 960 F.2d at 324 *Siller , supra,* 1348

In response, the *Siller* court stated that the *John Doe* court "summoned neither reasoning or case authority in defense of its holding." *Siller, supra,* 1348. *Siller*, thereafter, held that the origin of any public disclosure is crucial to the required "based upon" analysis.

As opposed to *John Doe's* presumption that "based upon" merely means "publicly disclosed", the *Siller* court emphasized

that "based upon" must be interpreted as meaning "derived from" if the words of the statute are to be fairly and reasonably interpreted. To hold otherwise would replace one analytical step of the three part test with a mere presumption to the detriment of good policy, legislative intent, and sound construction of the statute.

The D.C. Circuit Court in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) as well as the 9th Circuit Court in the instant case *United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996)(App. A, 28) as well as the 10th Circuit Court in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993), however, do not embrace the three-step analysis of either *Siller*, *Federal Recovery Services*, or *Cooper*. Instead, *Springfield*, *Precision*, and *Devlin* follow the presumptive approach consistent with *John Doe*.

In *Springfield*, for instance, the court stated that

> [t]he 1986 *qui tam* amendments set up a **two part test** for determining jurisdiction. [emphasis added] *Springfield, supra*, 651

Consequently, the *Springfield* court stated that if a qui tam plaintiff's allegations have been previously publicly disclosed, the plaintiff must qualify as an "original source". Public disclosure itself, with nothing more, requires "original source" analysis under the two step approach.

The 10th Circuit in *Precision* also appears to embrace a two step analysis of the jurisdictional bar. In *Precision*, the court rejected the *qui tam* plaintiff's argument that his suit was not "based upon" publicly disclosed allegations. Citing judicial economy, the court concluded that

> Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute. *Precision , supra,* 553.

Consequently, the court dropped any "based upon" analysis entirely from inquiry. The court simply stated that a plaintiff's

action may not proceed if allegations were publicly disclosed, unless the plaintiff qualified as an "original source".

In the current case at bar, the 9th Circuit Court in *Devlin* similarly followed the two step approach in interpreting the FCA statute. The court's opinion rested entirely on "original source" analysis after writing the following cursory statement regarding whether the relators' action was "based upon" publicly disclosed allegations:

> Because the action was filed after the newspaper publicly disclosed the allegations of fraud, the district court lacked subject matter jurisdiction unless the relators were an "original source" of the information upon which the allegations were based.

Consequently, the court immediately presumed "based upon" from the fact of prior disclosure such that "original source" analysis was required.

The 2nd Circuit Courts in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993) and *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990) also appeared to embrace a three step analysis of the FCA by recognizing that no "original source" analysis is needed if it is the *qui tam* plaintiff who first disclosed the allegations on which his or her suit is based. See *Kreindler*, *supra*, 1158, and *Dick*, *supra*, 18. Whether such analysis is deemed to be a two step approach with an exception or whether it is deemed a three step approach makes no difference to the fact that "based upon" to those courts meant more than a mere presumption from prior publication.

The instant case was decided under the "presumptive standard" resulting in a jurisdictional bar that would have never applied under *Siller*, *Cooper*, *Federal Recovery Services*, *Dick*, or *Kriendler*. The *qui tam* relators in this case learned of the fraud through personally interviewing and examining records from the same County social worker who was systematically perpetrating the fraud with encouragement from his supervisor prior to any public disclosure. The relators informed the government of the fraud, to no avail, six

weeks before filing suit. Then, approximately seven days before filing suit, the relators also informed the *Mariposa Gazette* before any allegation of the fraud was previously made public by anyone.

Different Circuits have applied different standards and analytical approaches to facts such as described above. As a consequence of mere chance among the conflicting Circuits, the plaintiffs here have been jurisdictionally barred under a two-step analytical approach that has been utterly rejected by the 4th Circuit in *Siller*, the 11th Circuit in *Cooper*, the 5th Circuit in *Federal Recovery Services,* and, apparently, the 2nd Circuit in *Dick* and *Kreindler.*

The 9th Circuit in the instant case only finds support for its two-step analysis in the D.C. Circuit case of *John Doe*, the *Springfield* case out the 2nd Circuit, and the *Precision* case out of the 10th Circuit. Those cases indicate that mere prior publication of allegations contained in a qui tam plaintiff's subsequent suit irrespective of whether the *qui tam* plaintiff was the disclosure automatically requires the relator to qualify as an "original source".

In contrast, the other Circuits first analyze whether a plaintiff "based" his or her allegations on the publicly disclosed allegations by using a three step process that accounts for who made the allegations public and whether the plaintiff's allegations were derived from previously publicly disclosed allegations.

A reading of the FCA that is more consistent with legislature's intent to spur private involvement is found in the three step analysis of *Siller*, *Cooper*, *Federal Recovery Services, Dick* and *Kreindler*. The presumptive automatic bar applied in *Springfield*, *John Doe, Precision*, and, now, *Devlin* has the effect of discouraging private involvement as described below.

B. The Presumption Of "Based Upon" From Merely Showing Publication Fails To

Effectuate The "Based Upon" Language Of The Statute.

The Circuit Courts in *Devlin*, *John Doe*, *Springfield* and *Precision* automatically presume that if allegations or transactions are publicly disclosed prior to the time a qui tam plaintiff filed suit, the plaintiff must qualify as an "original source." Such courts engage in no analysis of the words "based upon" other than automatically presuming an action is "based upon" public disclosure if the plaintiff's allegations bear a similarity to the allegations or transactions that exist in the public domain.

In partial support of this automatic presumption, the *Dick* Court concluded that Congress intended publication to, in essence, be a race so as to encourage the earliest possible disclosure because

> by barring those who come forward only *after* public disclosure of possible False Claims Act violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time. *Dick* , *supra,* 18.

Therefore, the automatic presumption as noted in *Dick* appears to comport with Congressional intent.

While linguistically plausible, the automatic approach does not address congressional intent as to who the potential racing plaintiffs would, in all likelihood, be. If Congress intended quick public disclosure to foment immediate cessation of the fraud, then the race should be between all potential *qui tam* plaintiffs so as to stop the hemorrhaging of public coffers as soon as possible. It is important to note in the instant case that the relators were the first persons to make any disclosure to both the government and the media prior to filing suit.

If Congress intended to cause a race, it would most likely result in a race between the media and all potential qui tam plaintiffs with the practical effect being to force a potential *qui tam* plaintiff to file suit under the Statute simultaneous with

informing the government to avoid being beaten in the race. If a government employee, for instance, leaked to the press or any other person an allegation reported to the government by the *qui tam* plaintiff or if another potential *qui tam* plaintiff published the allegation before the *qui tam* plaintiff filed suit, the plaintiff who brought the allegation to light in the first place would be barred under this analytical construction of the statute .

Furthermore, if Congress intended an automatic bar under subsection "A" of the FCA whenever publication occurred, another practical effect would be to encourage only suits by professional plaintiffs who are skilled in the technical vagaries of FCA law to the almost certain exclusion of conscientious citizens who merely intend to end needless government waste. If the alleged fraud, for instance, was sizable which is the type of fraud the government probably most wants to stop, it would be difficult to "keep a lid on it" long enough to allow an uninitiated *qui tam* plaintiff to seek an attorney and prepare a lawsuit prior to some publication.

Consequently, it seems unlikely that Congress intended, as a practical matter, to encourage private plaintiffs to wait until they fully prepared documents for filing a lawsuit before informing the government of fraud.

C. Congress Intended "Based Upon" To Mean "Derived From" As Opposed To Mere Automatic Presumption.

The *Dick* court resolved the problem noted above by reasoning that if the *qui tam* plaintiff is the one who released the allegations into the public domain, then such a plaintiff would not be barred. See *Dick , supra,* 18.

The *Dick* court also spoke of legislative intent when it alluded to Senator Grassley and Representative Berman as reflected in the 1986 Senate Report when writing that

> the 1986 amendments require that a *qui tam* suit be **based on** information not then publicly disclosed,

> unless disclosed, directly or indirectly, by the person bringing the suit. [emphasis added] *Dick , supra,* 17

Consequently, the *Dick* court as well as the Legislative sponsors of the FCA amendments recognized that when a *qui tam* plaintiff does not learn of the allegations of his or her action through publicly disclosed allegations, such action is not subject to the bar of subsection "A".

Although obscured by the facts of the case, the *Dick* court employed a three-step approach but proceeded to the "original source" analysis at the appellant's request. *Dick , supra,* 16.

Furthermore, other courts have rigorously examined the words "based upon" with the facts of each case prior to engaging in any "original source" analysis. Although the Circuits agree that subsection "A" of the FCA should be examined before subsection "B," there is a conflict among the Circuits about what "based upon" means. See *United States ex rel. Williams v. NEC Corp.,* 931 F.2d 1493 (11th Cir. 1991) at 1500, and *Cooper , supra,* 565

In *Siller*, for instance, the 4th Circuit Court specifically noted that the statute required interpretation and application of the words "based upon" during FCA analysis. In rejecting the automatic presumptions of other Circuits, the *Siller* court noted that it preferred

> the plain meaning of the words enacted by Congress over our sister Circuit's as-yet unconsidered assumptions as to the meaning of those words.

The court then reasoned from 1) the construction of the words themselves, 2) practical contraction of the statute, and 3) Congressional intent showed that "based upon" means "derived from". Therefore, the "based upon" language of subsection "A" required a separate inquiry regarding what formed the basis of the plaintiff's suit. If the plaintiff's allegations were not "derived from" any public disclosure, then there is no need to begin the "original source" analysis because the plaintiff is not first barred under subsection "A".

A rigorous analysis of "based upon" like that of *Siller* was also employed in the District Court case of *United States ex rel. LaValley v. First National Bank of Boston,* 707 F.Supp. 1351 (D. Mass. 1988) where the court found that the plaintiff's *qui tam* action was not "based upon" publicly disclosed information because the plaintiff developed his knowledge independently of what was previously publicly disclosed. *La Valley, supra,* 1367.

Consequently, the courts in *Siller*, *Kriendler*, *Cooper* and *LaValley* indicate that Congress intended subsection "A" of 31 U.S.C. §3730(e)(4) to be rigorously examined prior to engaging in "original source" analysis", especially where the relators, as here, are the persons who released the allegations into the public domain. Even the *Dick* court recognized that both Senator Grassley and Representative Berman excepted from the jurisdictional bar any suit "based upon" information in the public domain if the relator was the one who disclosed the allegations in the first place.

Other courts such as those in *John Doe, Springfield*, *Precision*, and, now, *Devlin* which automatically presume the need for "original source" analysis merely because the allegations of a *qui tam* plaintiff's suit are similar to what is publicly disclosed by the time the plaintiff files suit regardless of whether the relator is the person who made the public disclosure, creates a different standard in conflict with other Circuit decisions. Such decisions do not comport with legislative intent and the rules of statutory construction insofar as giving every word of a statute a plain and ordinary meaning as noted under *Siller*.

D. The Existing Spectrum Of Standards, Varied Requirements, And Shifting Burdens Between The Circuits Warrant Intervention And Clarification By This Court.

This court should review this case to settle among conflicting Circuits what bars a potential *qui tam* plaintiff and how that bar is applied. The current conflicts have chilled the

climate in opposition to Congress' intent to promote more private action under the FCA.

The practical effect of allowing both a two-step and a three-step analysis to continue is that plaintiffs in different Circuits will have different burdens in going forward. If, for instance, "based upon" is automatically presumed under the statute, then a defendant must only show public disclosure to trigger the plaintiff's obligation to qualify as an "original source".

However, if "based upon" means "derived from", a defendant must prove some public disclosure, then the burden shifts to the plaintiff to explain why their action is not "derived from" the public disclosure - all under subsection "A", thereby allowing a plaintiff such as in the instant case to show that he disclosed the allegations in the first place. Then, only if the plaintiff fails to show that his or her allegations were not derived from what has been published would the court consider any "original source" analysis.

The case at bar is a prime example of what happens under the differing standards and burdens. Speaking of the relators here, the *Devlin* court emphasized the practical problem of the two-step approach when it stated that "Congress . . . has placed an obstacle in their path to the courthouse door: the "original source" requirements established by §3730(e)(4). *Devlin*, (App. A, 28 n.6). The relators believe the obstacle is not Congress but the court's use of a two-step analysis of the statute.

This question is of substantial import due to the varied analytical approaches employed by the Circuits and their impact on meritorious and non-meritorious actions. It is not proper for meritorious claims to be barred in some Circuits due to the use of a presumptive, automatic standard that other Circuits have rejected as inconsistent with legislative intent and the plain meaning of the statute. It would be equally incorrect for some Circuits to allow claims to proceed that Congress intended to bar.

The Circuit Courts, as in *Siller*, have published opinions in direct conflict with other Circuits. However, the Circuits are not harmonizing their opinions. If anything, they appear to be becoming more entrenched. Now, as in the instant case, an otherwise meritorious claim is barred due to the two-step analytical approach employed by the Ninth Circuit.

Congress intended uniform application and interpretation of the FCA throughout the United States - especially in light of its legislative intent to promote more private actions. However, uncertainty in this area has bred only reticence and uneven application of the law. This circumstance does not promote the discovery and elimination of fraud.

II. THIS COURT SHOULD CLARIFY THAT CONGRESS DID NOT INTEND TO EXCLUDE THE RELATORS IN THIS CASE WHEN CONGRESS REQUIRED "DIRECT" KNOWLEDGE OF INFORMATION UNDER THE "ORIGINAL SOURCE" EXCEPTION OF 31 U.S.C. §3730 (e)(4)(B).

A. It Was The Intent Of Congress To Encourage Private Citizens To Help Stop The Illegitimate Loss Of Federal Funds By Allowing Private Suits Where Government Institutions And Bureaucrats May Have Little Or No Incentive For Stemming Fraud.

In construing a statute, the fundamental rule of construction centers on effectuating legislative intent. "[T]he starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska,* 451 U.S. 259, 265 68 L. Ed.2d 80, 101 S. Ct. 1673 (1981) Therefore, in construing 31 U.S.C. §3730(e)(4) this court should look to the language of the statute itself as well as the intent of Congress to determine its fair and proper meaning.

In support of reinvigorating the *qui tam* plaintiff provisions under the 1986 amendment to the FCA, Representative Badell stated that

> This section [*qui tam* provision] goes a long way toward restoring teeth to a law that was basically defanged in 1943 and rendered useless. I believe it is good policy to encourage citizens to help ensure that their tax dollars are spent well and to pressure the government to follow through on cases raised by those citizens. 132 Cong Record HR22340 (Sept.9, 1986).

Consequently, the *qui tam* plaintiff was granted power under the statute to step in where the government fails to protect itself from fraudulent claims on the Federal treasury.

As stated in both the House and Senate Reports as cited in *Dick*,

> The purpose of the qui tam provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward. H.R.Rep. No. 660, 99th Cong., 2d Sess. 22 (1986); see also Senate Report at 14, 1986 U.S.Code Cong. & Admin.News 5279 (quoting testimony before the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure stating that the amended False Claims Act rewards those who bring "wrongdoing to light"). *Dick , supra*,18.

In the instant action, the State of California and the County of Mariposa allegedly defrauded the Federal Treasury in that Mariposa County agents deliberately inflated Child Protective Services statistics and inflated hours reported on emergency response cases when completing time studies so as to fraudulently increase their federal funding. Such actions occurred with the alleged complicity, or, at least, the apathy of the California State Department of Social Services.

The relators in the instant case attempted to stop Mariposa's reporting fraud by contacting four members of the United

States Congress, two California State Assemblymen, the Federal Bureau of Investigation, The California Auditor General, and the Governor of California - all to no apparent avail.

It was only after filing the instant case that the California State Department of Social Services informed the relators by letter on March 11, 1992 that all information about allegations of Social Services fraud by a County are confidential and cannot be discussed by that agency.

As can be seen from the following section, the relators received their information from a Mariposa County social worker who was actually perpetrating the fraud by systematically inflating statistics and even inflating past statistics for the sole purpose of increasing Federal funding with encouragement from his direct Social Service supervisor.

Under the above described facts where all reports to the government had no apparent effect in stopping future fraud and where no illegitimately claimed funds were returned to the federal coffers, a *qui tam* plaintiff is the person designated by Congress to protect the public interest.

Even though the State of California has an oversight responsibility under 42 U.S.C. §671(a)(13) to ensure compliance with the Federal funding restrictions, both the County and the State have little to no incentive to stop Mariposa's inflated funding statistics; each realize benefits from having additional funds flowing to the state and county. This is one precise circumstance for which Congress enacted the *qui tam* provisions of 31 U.S.C. §3730. In fact, Senator Grassley, the co-sponsor of the 1986 FCA amendment emphasized that " . . . Government does not always work in the best interest of the Government" [Sen Rpt 99-345 99th Congress (1986)]. Consequently, he specifically found the *qui tam* provisions necessary to carry out the purpose of the Act.

If anything, Congress was concerned that the *qui tam* provisions would allow "parasitic" suits by opportunists who

did nothing to stop fraud or bring it to light. The lower court in this case concluded that the instant relators were NOT "opportunistic"[1]. Consequently, this case is not one in which the relators are parasitic opportunists. Despite that conclusion, the Ninth Circuit stated that Congress intended to bar the instant relators under the statute.

Although it is difficult to divine legislative intent from Congressional debates, this court should give special weight to Senator Grassley's statements. As the court noted in *Cooper*, the "sponsor or author of legislation" is "entitled to some weight " in determining legislative intent. *Cooper, supra,* 565, n.3.

In discussing the *qui tam* provisions of the FCA, Senator Grassley, the cosponsor of the 1986 amendments stated in 1990 that

> . . . the Act should be reinterpreted by the courts. In the Act's current guise, there are, and will be, cases where a party defrauds the government, a private plaintiff has become aware of the fraud and commences suit on the government's behalf, the Attorney General declines to intervene, but the court's interpretation of the Act bars jurisdiction, giving the party defendant carte blanche to continue working the fraud. This does not further Congress' intention of spurring private involvement while preventing parasitic suits. False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990)

The current relators find themselves in the very situation addressed by Senator Grassley. They discovered the fraud from a person actually falsifying the records who was thereby perpetrating the fraud. They promptly reported their

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[1] "We do not intend to suggest that the relators were opportunistic. We recognize that they had a hand in the public disclosure of the alleged fraud . . . . Devlin at 6233 fn. 6

allegations to the government through the Office of the California Governor, the California Auditor General, four United States Congressmen, and two California State Assemblymen. Each either did not respond, stated they had no authority to act, or declined to discuss the matter under the guise of Social Services confidentiality restrictions. The Attorney General declined to intervene The relators reported some of their allegations to the media and approximately shortly thereafter they filed suit.

Now, the 9th Circuit Court has employed the "direct" knowledge test of the "original source" requirement so as to stop these relators and virtually all non-employee private plaintiffs from using the FCA to halt systematic, institutional Welfare fraud on the federal treasury. Surely this was not what Congress intended when it amended the statute to "spur" private involvement.

In fact, the Senate Report regarding the 1986 Amendments to the FCA noted that

> changes [were] necessary to halt the so-called 'conspiracy of silence' that has allowed fraud against the government to flourish. *Dick* citing S.Rep. No. 345 99th Cong., 2d Sess. 6 (1986), U.S.Code Cong. & Admin.News 1986, pp 5271.

B. "Direct" Knowledge Is Knowledge That Is Derived From Personal Investigation, Including Interviewing The Perpetrator Of The Fraud And Examining Documents From That Same Perpetrator As In The Case At Bar.

The *Devlin* court rested its decision in this case on the fact that the relators did not have "direct" knowledge of the allegations on which their suit is based because they did not have "firsthand" knowledge of the information. See *Devlin* , (App. A, 29).

Notwithstanding the fact that the relators here received their information from the very person who had systematically

perpetrated the fraud, there is no indication in the legislative history to indicate that Congress sought to bar potential *qui tam* plaintiffs who had secondhand knowledge of fraud through requiring "direct" knowledge. No legislative history discloses any nexus between "direct" knowledge and "firsthand" knowledge.

In fact, the Congressional Record discloses that persons who merely learned of fraud from insiders could bring their own *qui tam* action, thereby demonstrating no Congressional distinction between firsthand and secondhand knowledge by those who report the fraud. *See* Cong.Rec.28580 (1986) See also *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149,1173-4 (3d Cir. 1991) Scirica, J. Dissenting - arguing that there is "no support for the view that the word "direct" was intended to constitute a separate jurisdictional bar." If Congress wanted to bar secondhand suits, it could have easily done so explicitly under the statute. It did not.

Senator Grassley further stated during amendment of the FCA that even persons who learned of fraud secondhand or even through general public disclosure could recover a diminished amount under §3730(d)(1) - even though such plaintiffs did not have independent knowledge of their own. *See* 132 Cong.Rec. 20536 Such statements and amendments recognize that firsthand knowledge was not intended to be a prerequisite to maintaining an action.

The *Devlin* court refers to *Wang*, *Stinson*, and *Houck on Behalf of United States v. Folding carton Admin. Committee*, 881 F.2d 494 (7th Cir. 1989), *cert. denied, sub nom., Certified Plaintiff Class in MDL-250 v. Folding Carton Reserve Fund*, 494 U.S. 1026 and *cert. denied, sub nom., In re Will*, 494 U.S. 1025 (1990) as standing for the proposition that "direct" under the "original source" section of the FCA means "unmeditated by anything else" or as "marked by absence of an intervening agent". Consequently, the current relators were deemed barred because they only learned of the fraud secondhand by merely interviewing the person who

inflated the statistics and by reviewing photocopies of hand printed cards evidencing the fraud.

"'[T]he starting point in every case involving construction of a statute is the language itself. *Watt v. Alaska*, 451 259, 265, 68 L.Ed.2d 80, 1091 S.Ct. 1673 (1981) (citation omitted).'" *Primate Protection League v. Tulane Ed. Fund,* 500 U.S. 72; 111 S.Ct. 1700; 114 L.Ed.2d 134. The *American Heritage Dictionary of the English Language* 373 (1979) defines "direct" as "[p]roceeding or lying in a straight course or line." This more generalized meaning of "direct" is a plausible and more reconcilable meaning of the word "direct" insofar as the FCA is concerned.

If "direct" is viewed as "unmediated by anything else" or "marked by absence of an intervening agent," then, for the most part, insiders and perpetrators would be the only persons with "direct" knowledge of the fraud. Although Congress clearly intended insiders to be potential claimants, the practical effect of *Devlin's* narrow interpretation of "direct" is to stop all private plaintiffs who learn of fraud from an actual perpetrator. Congress intended to promote disclosure and stoppage of the fraud. Therefore, a narrow interpretation of the word "direct" would not appear to further that purpose

The more general meaning of "direct" as "proceeding from" more readily effectuates Congress' intent under the FCA. Instead of focussing on whether a plaintiff sees fraud with his or her own eyes while it is then occurring or focussing on whether a plaintiff views a photocopied document rather than an original while it is being prepared, the more general meaning of "direct" focuses on whether the knowledge of fraud has proceeded to the plaintiff in a straight line (ie. in a direct manner).

In the instant case, the plaintiff learned of the fraud from the perpetrator. It is hard to conceive of a more direct line or manner than that. Congress did not intend to limit *qui tam* plaintiff's to those who, in essence, look over a perpetrator's shoulder to catch them in the act of committing some fraud that usually occurs in an office behind closed doors. Indeed, if

that were the case virtually all plaintiff's would be barred because there are always mediating and intervening agents such as copy machines, telephones, and computers. Such a narrow construction of "direct" would create even more confusion in applying the FCA.

In addition to ascertaining the plain meaning of the words of a statute, statutory construction requires looking "to the design of the statute as a whole and to its object and policy" *K-Mart Corp., V. Cartier, Inc.,* 486 U.S. 281, 291 (1988) See also *Crandon v. United States,* 494 U.S. 152, 158 (1990) In the instant case, such interpretation would include Congress' intent to encourage more private actions. A narrow interpretation of "direct" would hinder that policy.

In the current case, if Congress intended only those who, actually witnessed the statistic sheets being directly inflated, inscribed, and altered by the social worker, no private plaintiff would be able to stop such fraud through a qui tam action. Social workers fill out their paperwork in a private office under strict requirements of confidentiality under state and federal law.

Another uniqueness of the case at bar is that special statutes create a veil of secrecy behind which social workers and social service agencies function. Virtually no *qui tam* plaintiff would be able to pierce this veil but for some voluntary disclosure by an insider. Because Congress intended to halt fraud through private FCA suits, allowing only suits by insiders against an agency that has no incentive to police itself would potentially allow perpetuation of the fraud with impunity under a narrow interpretation of "direct".

Social workers, for instance, are bound to silence under 45 C.F.R. § 205.50(F)(iii) because"[d]isclosure of any information that identifies by name or address any applicant of recipient to any Federal, State, or local committee or legislative body... is prohibited". 45 C.F.R. § 205.50(F)(iv) also states that "[p]ublication of lists of names of applicants and recipients will be prohibited".

Regarding confidentiality, 45 C.F.R. § 1340.14(i) further states that (1) The State must provide by statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." Under this scenario, private plaintiff's are already limited in their ability to learn of information to support an FCA action. See also California Welfare and Institutions Code § 10850 which provides criminal penalties for unauthorized disclosure of Social Service Agency information.

C. In The Confidential Arena Of Welfare Funding Claims By Local And State Governments, Congress Did Not Intend To Bar The Instant Plaintiff Or Other Private Relators Through The "Direct" Knowledge Test Because Such An Interpretation Would Bar All Private Relators Who Are Not Employees Of Government Welfare Agencies.

Even under the most labored and narrow meaning of the "direct" knowledge requirement of the FCA, a confession of fraud from a perpetrator is direct knowledge. A confession may only be circumstantial and not direct evidence of fraud. But, it is certainly "direct" because it proceeded straight from the perpetration. Regardless of whether the worker's confession is deemed firsthand information or secondhand information, the confession and photocopied records meet the "direct" requirement of the FCA.

It is unlikely that Congress intended to bar a private plaintiff from maintaining a suit where the actual perpetrator who falsified records only confessed to the relator and not to any government agent so as to stop the continuing fraudulent practice.

Consequently, Congress did not intend to stop the relators in this case from maintaining an action under the FCA. Limiting access by these and similarly situated relators would allow unfettered fraud on the national treasury because only

employees who actually see the fraud would be able to maintain an action if publication had occurred. Such an interpretation would in the best case slow the reporting of fraud and in the worst case, as here, it would eliminate *qui tam* access to the courts.

In the unique arena of county and state Social Service Agencies, the veil of secrecy and confidentiality perpetuates institutionalized lethargy and apathy regarding inflating statistics to illegitimately tap the federal treasury. Though it is nearly impossible to pierce the veil, Congress specifically reinvigorated the *qui tam* provisions of the FCA in 1986 to break the conspiracy of silence and inform the indulgent to imbibe no more.

In the modern climate of Welfare reform and decreased federal resources, it is unfair to the needy of one state to allow shrinking resources to be misdirected to states that deliberately inflate statistics and illegitimately claim a share of welfare dollars. To bar the relators in this case misinterprets the statute and fails to promote the aims of Congress in amending the FCA.

CONCLUSION

For the foregoing reasons, the realtors respectfully request this court to grant this petition for a Writ of Certiorari to the Ninth Circuit to clarify and settle the issues stated herein.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. WILLIAM DEVLIN; STANLEY H. SIDICANE; ROD KODMAN, *Plaintiffs-Appellants,*	)	No. 93-16729
v.	)	D. C. No. CV-92-05086 REC
STATE OF CALIFORNIA; COUNTY OF MARIPOSA MARIPOSA; and TOM ARCHER, *Defendants-Appellees.*	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
March 15, 1995--San Francisco, California

Filed May 24, 1996

Before: William A. Norris, Charles Wiggins, and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Government Law/Torts

The court of appeals affirmed a district court judgment. The court held an individual who learns secondhand of allegations of fraud against the federal government does not have "direct" knowledge for purposes of bringing a False Claims Act *qui tam* action.

William Cotey, an employee of the Social Services Department of Mariposa County (SSD), informed appellants Rod Kodman and William Devlin of SSD's alleged fraud upon the federal government. SSD allegedly inflated client statistics in order to qualify for increased federal funding under federal programs.

Shortly thereafter, Devlin, Cotey, and Cotey's wife met with reporter Jerry Rankin and told him about the alleged fraud. The newspaper published an article by Rankin describing SSD's allegedly fraudulent conduct.

Five days after the article appeared, Devlin and Kodman filed a *qui tam* action under the FCA. The district court dismissed the action for lack of subject matter jurisdiction on the ground that the relators were not an "original source" of the information on which the allegations of fraud were based. The court held that the relators were not an original source because their knowledge of the SSD's alleged fraud was not "direct and independent." The relators appealed.

[1] Because the action was filed after the newspaper publicly disclosed the allegations of fraud, the district court lacked subject matter jurisdiction unless the relators were an "original source" of the information upon which the allegations based.

[2] In this case, the relators' knowledge was not direct and independent. They did not discover firsthand the information underlying the allegations of fraud. The relators did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but rather derived it secondhand from Cotey, who had firsthand knowledge of the alleged fraud as a result of his employment. [3] Although Devlin contacted persons who told him that they did not receive services for which SSD allegedly billed the government, the verification Devlin obtained from those persons did not add anything of significance to the information that the relators obtained from Cotey. The knowledge that Devlin obtained did not make a genuinely valuable contribution to the exposure of the alleged fraud.

[4] The "original source" requirements are intended to bar parasitic suits through which a plaintiff seeks a reward even though he or she has contributed nothing significant to exposure of the fraud.

COUNSEL

William Devlin, Fresno, California; Stanley H. Sidicane, Opelika, Alabama; Rod Kodman, Merced, California, in Pro Per for the plaintiffs-appellants.

Steven Wayne Dahlem, Mariposa, California; Theodore Garelis, Deputy Attorney General, Sacramento, California, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

This is a *qui tam* action filed under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733 (1988), based upon allegations that the Social Services Department of Mariposa

County ("SSD") has defrauded the United States government by inflating client statistics in order to qualify for increased federal funding under various federal programs. The district court dismissed the action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that the relators were not an "original source" of the information on which the allegations of fraud were based as required by §3730(e)(4) of the FCA.[2] We affirm.

I

The facts relevant to the original source issue are not in dispute: During the week of January 3, 1992, relators Rod Kodman and William Devlin were informed of the alleged fraud by William Cotey, an SSD employee who had participated in the fraud by falsifying records. Shortly thereafter, relator Devlin, Cotey, and Cotey's wife met with Jerry Rankin, a *Mariposa Gazette* reporter, and told him about the alleged fraud. On February 6, 1992, the *Mariposa Gazette* published an article by Rankin describing SSD's allegedly fraudulent conduct. Five days after Rankin's article appeared, the relators filed this *qui tam* action.

[1] Because the action was filed after the *Mariposa Gazette* publicly disclosed the allegations of fraud, the district court lacked subject matter jurisdiction unless the relators were an "original source" of the information upon which the allegations

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[2]Section 3730(e)(4) of the FCA provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. §3730(e)(4).

were based.[3] 31 U.S.C. §3730(e)(4)(A); *United States ex rel. Fine v. Chevron,* 72 F.3d 740, 743 (9th Cir. 1995) (en banc). The district court held that the relators were not an original source because their knowledge of the fraud allegedly perpetrated by SSD was not "direct and independent" within the meaning of § 3730(e)(4).[4]

II

Only two Ninth Circuit cases address the question of what constitutes "direct and independent" knowledge for purposes of § 3730(e)(4). In both cases, we held that the relator had "direct and independent" knowledge because he had discovered the information underlying his allegations of wrongdoing through his own labor.[5] In *Wang v. FMC*

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[3]The exception to § 3730(e)(4)(A)'s bar against suits based on publicly disclosed allegations for suits brought by the Attorney General is plainly inapplicable.

[4]To be an "original source," a relator must show that he or she has "direct and independent knowledge of the information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B), "voluntarily provided the information to the Government before filing" his or her *qui tam* action, *id.*, and "had a hand in the public disclosure of the allegations that are part of [his or her] suit", *Wang v. FMC Corp.*, 375 F. 2d 1412, 1418 (9th Cir. 1992). It is undisputed that the relators have satisfied the latter two requirements.

[5]A panel of this court reached a similar result in *Unite States ex rel. Fine v. Chevron,* 39 F.3d 957 (9th Cir. 1994), holding that an auditor-relator had "direct and independent" knowledge of the information underlying his *qui tam* action because his "own labor" -- reviewing audit sheets and other financial records -- led to his discovery of the allegedly fraudulent payments. *Id.*. at 961-62. The panel opinion was vacated by the en banc court that reheard the case. *Fine,* 72 F.3d at 741 n.1. The en banc court did not reach the question of whether Fine's knowledge was direct and independent because it held that Fine failed the "voluntary" prong of the original source test. *Id.* at 743.

Other circuits have likewise held that knowledge is "direct" when it derives from information obtained firsthand through the relator's own labor. *Cooper ex rel. United States v. Blue Cross & Blue Shield of Florida, Inc.* 19 F.3d 562, 568 (11th Cir. 1994) (per curium) (relator's knowledge of an alleged fraud by a Medicare secondary payer is direct because it was acquired through "three years of [the relator's] own claims processing in, research, and correspondence with members of Congress and [the Health Care Financing Administration]");

Corp., 975 F.2d 1412 (9th Cir. 1992), we held that an engineer-relator who had been called in to study a problem with a product had "direct and independent" knowledge of the problem because "he saw [it] with his own eyes" and his knowledge was "unmediated by anything but [his] own labor." *Id.* at 1417. Similarly, we held in *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), *cert denied*, __ U.S. __, 114 S. Ct. 1543, 128 L. Ed. 2d 195 (1994), that an employee of a government subcontractor who brought a *qui tam* action alleging falsified testing had "direct and independent knowledge" of the allegations because "he acquired [his knowledge] during the course of his employment [by the subcontractor]." *Id.* at 411.

[2] In this case the relators' knowledge was not direct and independent because they did not discover firsthand the information underlying their allegations of fraud.[67] They did

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Houck ex rel. United States v. Folding Carton Admin., 881 F.2d 494, 505 (7th Cir. 1989) (attorney-relator had direct knowledge of alleged fraudulent distribution of settlement because his knowledge resulted from his involvement in assisting late class action claimants in recovering money out of settlement order funds), *cert. denied*, 494 U.S. 1026 (1990); *see also United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994) (defining "direct" for purposes of § 3730(e)(4)(A) as "marked by absence of an intervening agency, instrumentality, or influence" and holding that attorney-relator did not have direct knowledge because his information of the alleged wrongdoing, obtained through a memorandum produced in discovery prior lawsuit, came through two intermediaries: the company employee who was responsible for the memorandum and the discovery process).

[7]The relators argue that they had direct and independent knowledge of the information upon which the allegations were based because they had evidence of the fraud prior to the public disclose of the allegations. Relator Devlin interviewed Cotey about the fraud during the week of January 13, 1992, that is, at least two weeks before the *Mariposa Gazette* article describing the fraud appeared. Relator Kodman also received on January 21, 1992, 15 days before the article appeared, a letter from Cotey outlining the fraud and providing him with ledger cards and sheets documenting the allegedly fraudulent work. The fact that the relators had evidence of the fraud prior to the public disclosure of the allegations establishes that their knowledge was "independent". *See*

not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but derived it secondhand from Cotey, who had firsthand knowledge of the alleged fraud as a result of his employment at SSD.

[3] The relators argue that their knowledge of the alleged fraud was direct because of relator Devlin's personal efforts to verify the accuracy of the information the relators obtained from Cotey. It is true that Devlin contacted persons who told him that they did not receive services for which SSD allegedly billed the government. The question, however, is whether the verification Devlin obtained from these persons added anything of significance to the information the relators obtained from Cotey. We do not believe it did. The information Cotey disclosed to the relators is that SSD had fraudulently billed the government for services to persons who had not received the services, together with a description of those services and a list of the names of the persons SSD claimed to have received the services. Armed with all that information, anyone could easily have done what Devlin did: contact persons on Cotey's list and ask them whether they had in fact received the services that had been described by Cotey. That is all Devlin did, and it is virtual certainty that federal investigators would have done precisely the same thing once the information provided by Cotey had been made public. Viewed in this light, the knowledge Devlin obtained did not make a genuinely valuable contribution to the exposure of the alleged fraud.

Wang, 975 F.2d at 1417. Implicit in the relators' argument, therefore, is the contention that a showing that knowledge is "independent" is sufficient to satisfy § 3700(e)(4)'s requirement that an "original source" have "direct and independent" knowledge. The statute, however, is clear that an "original source" must have knowledge that is *both* direct and independent. *See* 31 U.S.C. § 3700(e)(4)(B) ("original source" means an individual who has direct *and* independent knowledge") (emphasis added)'; *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703, (8th Cir. 1995) (§3700(e)(4)(B) imposes a conjunctive requirement of both independent and direct knowledge); *Springfield Terminal Ry.* 14 F.3d at 656 (same); Stinson, 944 F.2d at 1160 (same). *But see Stinson*, 944 F.2d at 1172-74 (Scirica, J., dissenting) (arguing that Congress did not intend the word "direct" to constitute a separate jurisdictional bar).

The facts of this case thus differ materially from the facts in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), where the relator's own personal knowledge was essential to his conclusion that a fraud had been committed. *Id.* at 656-57 (employer-relator had direct and independent knowledge that a labor arbitrator had fraudulently billed the government for services not actually rendered because the relator's personal knowledge of the arbitration process and his interviews with the persons with whom the arbitrator had allegedly worked were essential to the conclusion that a fraud had been committed).

[4] Our holding is in keeping with the purpose of the FCA, which aims at ferreting out fraud by encouraging persons with firsthand knowledge of alleged wrongdoing to come forward. It is "the cooperation of individuals who are either *close observers or otherwise involved* in the fraudulent activity" that Congress sought to enlist through the *qui tam* provisions of the FCA. S. Rep. No. 345, 99th Cong., 2d Sess. 4. *reprinted in* 1986 U.S.C.C.A.N., 5269 (emphasis added); *see also United States ex rel. Stinson, Lyons, Gerlin, & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (FCA seeks to "encourage persons with *first-hand* knowledge of fraudulent misconduct" to come forward) (emphasis added). Conversely, the original source requirements of §3730(e)(4) are intended to bar parasitic suits through which a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of the fraud. As our court and others have explained, the 1986 amendments to the FCA steer a course between an overly restrictive interpretation of the FCA on the one hand, as exemplified by *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (barring jurisdiction whenever the Government possessed the information on which the claim was brought, even if it was the relator who had provided the government with the information), and an unrestrained permissiveness on the other, as exemplified by *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (allowing *qui tam* actions based solely on information already publicly disclosed). In other

words, the FCA has been shaped by Congress's "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own."[8] *Springfield Terminal Ry.*, 14 F.3d at 649; *see also Wang*, 975 F.2d at 1418-19, *Stinson*, 944 F.2d at 1154.

In holding as we do, we join the three other circuits that have considered this question, all of which have also decided that a person who learns secondhand of allegations of fraud does not have "direct" knowledge within the meaning of 31 U.S.C. § 3730(e)(4)(B). *See United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("a person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the [FCA]"); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1159 (2d Cir.) (attorney-relator who obtains information of alleged wrongdoing through disclosures made by alleged wrongdoer in discovery in a previous lawsuit does not have significant direct and independent knowledge; neither the collateral research and investigations conducted by the attorney significance of the disclosures were enough to establish that he had direct and independent knowledge), *cert. denied*, 508 U.S. 973 (1993); *Stinson, 944 F.2d at 1161* ("nothing . . . would bar suit by someone who learned of the fraud from an insider, *if* the information had not yet been publicly disclosed") (emphasis added). *But see id.* At 1173 (Scirica, J., dissenting) ("If Congress had intended to bar all "secondhand" relators, it could have done so explicitly, without predicating the bar on public disclosure.").

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[8]We do not intend to suggest that the relators in this case were opportunistic. We recognize that they had a hand in the public disclosure of the alleged fraud through their participation in the meeting with the *Mariposa Gazette* reporter. Congress, however, has placed an obstacle in their path to the courthouse door: the "original source" requirements established by 3730(e)(4).

The judgment of the district court dismissing the relators' complaint for lack of subject matter jurisdiction is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Filed July 19, 1993

UNITED STATES ex rel. William Devlin, et al., Plaintiff,	) No. CV-F-92-5086 REC
v.	) ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION
TOM ARCHER, et al., Defendant.	)

On July 12, 1993 the court heard the Motion to Dismiss filed by defendants Tom Archer and the county of Mariposa.[9] Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion for the reasons set forth herein.

The First Amended Complaint is brought by relators William Devlin, Stanley Sidicane, and Rod Kodman, pursuant to the False Claims Act, 31 U.S.C. §§ 3729 et seq. The First Amended Complaint is an action to recover damages and civil penalties on behalf of the United States arising out of false claims presented by defendants to the United States to secure

[9]This motion has been joined by defendant State of California.

monies paid under the Child Welfare Act of 1980, 42 U.S.C. §§5010 et seq., and other federal programs providing financial assistance and/or payments to state and county agencies.

Defendants move to dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure.[10]

31 U.S.C. § 3730(e)(4) provides in pertinent part as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting, Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and had voluntarily provided the information to the Government before filing an

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[10] Relators argue that because defendants have attached exhibits to their motion to dismiss, this court must convert this motion to one for summary judgment. Relators are incorrect. Only a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is required to be converted to a motion for summary judgment.

action under this section which is based on this information.

A. Public Disclosure.

Referring the court to an article published in the Mariposa Gazette on February 6, 1992, five days before the complaint commencing this action was filed, defendant argue that this court lacks subject matter jurisdiction because this action is based on public disclosure in the news media.

Relators concede that the article in the Mariposa Gazette sets forth in this action. However, because the relators had interviewed William Cotey, the source for the article in the Mariposa Gazette prior to the interview leading to the publication of the article and because the relators' interview of Cotey and their own investigation resulted in evidence not mentioned in the Mariposa Gazette article, it cannot be concluded that this action is based upon public disclosure to the news media.

In arguing that these facts suffice for the court to conclude that this action is not based on public disclosure, relators cite Wang ex rel. United States v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992), as recognizing a distinction

between allegations of fraud and all information published in the news media to be publicly disclosed information within the meaning of Section 3730(e)(4), the public disclosure must contain both the allegation and all of the information proving the allegation.

The court does not agree with the relators' reading of Wang. It must be noted that a finding of "public disclosure" within the meaning of the statute before there is a need for a qui tam plaintiff to show that he is the original source of the information. Wang, supra, 375 F.2d at 1416. Therefore, if there has been no public disclosure, the qui tam plaintiff need not prove his status as the original source. In Wang, the Ninth Circuit concluded that the relator's allegations had not been publicly disclosed. Because there had been no public disclosure of the relator's allegations, the relator had to show that he had direct and independent knowledge of the information on which the allegations were based. It was at this point in the opinion that the Ninth Circuit made the distinction between allegations and proof. 975 F.2d at 1417-1420. Therefore, the portion of the Wang opinion relied upon by the

relators in attempting to refute defendants' assertion that there has been public disclosure is not on point.

The relators also refer the court to United States ex rel. Stinson v. Prudential Insurance Company, 944 F.2d 1149, 1960 (3d Cir. 1991) as holding that "[a] party with knowledge of fraud against the Government ought to be able to maintain a qui tam action as long as he had some of the information in advance of the public disclosure." Therefore, the relators argue, the court should conclude that this action was not based on public disclosure of allegations set forth by the news media because the relators provide evidence not mentioned in the Mariposa Gazette article.

Again, the relators are misreading the case. In Stinson, the quoted portion of the opinion involved the issue whether relator in that case was an original source within the meaning of the statute. As noted above, the issue of original source does not arise unless it is determined that there has been no public disclosure.

Here, the court concludes that there has been public disclosure of the allegations or transactions upon which this

action is based. The fact that the relators claim to have had additional information to that reported in the newspaper article should not change this conclusion. As noted, the relators have cited no supportive case authority. Frankly, the distinction being made by the relators does not make sense, especially when the difference in the statute between "allegation or transaction" and "information" is noted. Therefore, the issue arises whether any of the relators are the "original source" within the meaning of the statute.

B. Original Source.

As noted above, Section 3700(e)(4) provides two exception [sic] allowing the court to exercise subject matter jurisdiction in an action in which public disclosure of the allegations or transactions at issue in the qui tam suit predates the commencement of the action. The relevant exception at issue here is whether any of the relators bringing this action are "an original source of the information."

The relators contend that they are an original source of the information such that the exception to the lack of subject matter jurisdiction should apply. In so arguing, they submit

declarations executed by relators Rod Kodman and William Devlin.

As noted above, the Ninth Circuit in Wang discussed in some detail the "original source" requirement. 975 F.2d at 1417-1420. In addition, the Third Circuit discussed the requirement in Stinson, supra, 944 F.2d at 1160-1161.

The court concludes that none of the relators have shown that they are original source of the information within the meaning of Wang. There is no question that Devlin, by his participation in the interview with the Mariposa Gazette reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." Wang, 975 F.2d at 1418. However, the court does not read either Kodman or Devlin's declarations as stating or being based on anything more that what William Cotey told them orally and in writing and through the documentary evidence provided to them by Cotey. Although the relators contend that Cotey's information and evidence relayed to them as well as the results (conclusorily described) of the results of Devlin's investigation of the persons whose names he received from Cotey gives them direct and

independent knowledge of the information, the court is not persuaded that this assertion is relevant. As the Ninth Circuit in Wang cautioned:

> It is important to note that under the rule we adopt today, all those who 'directly or indirectly' disclose an allegation might qualify as its original source . . . Anyone who helped to report the allegation to either the government or the media would have 'indirectly' helped to publicly disclose it. If, however, someone republishes an allegation that already has been publicly disclosed, he cannot bring a qui tam suit, even if he had 'direct and independent knowledge' of the fraud. He is no 'whistleblower.' A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics . . . .
>
> 975 F.2d at 1419.

At oral argument the relators contended that the court must conclude that they are the original source within the meaning of the statute because William Cotey, as a wrongdoer, cannot be an original source. The relators cite no authority for this proposition and the court can find none.

ACCORDINGLY, IT IS ORDERED that the defendants' Motion to Dismiss in granted.

IT IS FURTHER ORDERED that this action is dismissed for lack of subject matter jurisdiction.

Dated: July 16, 1993

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Filed July 29, 1993

UNITED STATES ex rel. William Devlin, et al., Plaintiff,	) No. CV-F-92-5086 REC) ORDER CORRECTING
v.	) ORDER DISMISSING) ACTION FOR) LACK OF SUBJECT
TOM ARCHER, et al., Defendant.	) MATTER) JURISDICTION

The court hereby corrects the Order Dismissing Action for Lack of Subject Matter Jurisdiction filed on July 19, 1993 nunc pro tunc as follows:

A) The sentence on lines 25-26 on page 3 and lines 1-2 on page 4 is corrected to read: It must be noted that there must be a finding of "public disclosure" within the meaning of the statute before there is a need for a qui tam plaintiff to show that he is the original source of the information.

B) The sentence on lines 2-4 on page 5 is corrected to read: As noted above, the issue of original source does not arise unless it is determined that there has been public disclosure.

The Order Dismissing Action for Lack of Subject Matter Jurisdiction filed on July 19, 1993 otherwise remains as it was issued.

Dated: July 26, 1993

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Filed September 2, 1993

UNITED STATES ex rel. William Devlin, et al., Plaintiff,	) No. CV-F-92-5086 REC
v.	) ORDER DENYING) MOTION FOR) RECONSIDERATION
TOM ARCHER, et al., Defendant.	)

On July 19, 1993, the court issued its Order Dismissing Action for Lack of Subject Matter Jurisdiction. On July 26, 1993 the court issued its Order Correcting Order Dismissing Action for Lack of Subject Matter Jurisdiction Nunc Pro Tunc.

Plaintiffs have filed a Motion for Reconsideration. The court denies this motion for the reasons set forth herein.

In these orders, the court dismissed this action for lack of subject matter jurisdiction on the ground that the relators were not an original source of the information on which the allegations are based within the meaning of 31 U.S.C. § 3730 (e) (4). Section 3730(e)(4) provides in pertinent part as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . from the news media, unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based . . . .

In the order, the court concluded that there had been public disclosure of the allegations upon which this action is based because of an article published in the Mariposa Gazette five days before the complaint commencing this action was filed. Because of this conclusion, the court went on to determine whether defendants were an "original source" within the meaning of the statute. In ruling that they were not, the court stated in pertinent part as follows:

> The relators contend that they are an original source of the information such that the exception to the lack of subject matter jurisdiction should apply. In so arguing, they submit declarations executed by relators Rod Kodman and William Devlin.
>
> As noted above, the Ninth Circuit in Wang discussed in some detail the "original source" requirement. 975 F.2d at 1417-1420. In addition, the Third Circuit discussed the requirement in Stinson, supra, 944 F. 2d at 1160-1161.
>
> The court concludes that none of the relators have shown that they are original source of the

information within the meaning of Wang. There is no question that Devlin, by his participation in the interview with the Mariposa Gazette reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." Wang, 975 F.2d at 1418. However, the court does not read either Kodman or Devlin's declarations as stating or being based on anything more that what William Cotey told them orally and in writing and through the documentary evidence relayed to them as well a the results (conclusorily described) of the results of Devlin's investigation of the persons whose names he received from Cotey gives them direct and independent knowledge of the information, the court is not persuaded that this assertion is relevant. As the Ninth Circuit in Wang cautioned:

> It is important to note that under the rule we adopt today, all those who 'directly' disclose an allegation to either the government or the media would have 'indirectly' helped to publicly disclose it. If, however, someone, republishes an allegation that already has been publicly disclosed, he cannot bring a qui tam suit, even if he had 'direct and independent knowledge' of the fraud. He is no 'whistleblower.' A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics . . . .

975 F.2d at 1419.

At oral argument the relators contended that the court must conclude that they are the original source within the meaning of the statute because William Cotey, as a wrongdoer, cannot be an original source. The relators cite no authority for this proposition and the court can find none.

The relators, referring the court to United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13 (2d Cir. 1990), argues that the term "original source" refers to the original source of the public disclosure of the fraud. Because this court concluded in its order that "[t]here is no question that Devlin, by his participater [sic] in the interview with the Mariposa Gazette reporter, 'had a hand in the public disclosure of allegations thta [sic] are part of [this] suit . . . '", the relators assert that they meet the requirements to be an "original source' as the term has been interpreted by the Second Circuit in Long Island Lighting.

The relators are misreading Long Island Lighting. In Long Island Lighting, the Second Circuit stated in pertinent part:

> In asserting the pertinent language of the statute, we note that 'original source' is expressly defined in §3730(e)(4)(B). A straightforward reading of §3730(e)(4)(B) indicates that to be an 'original source' a qui tam plaintiff must (1) have direct and independent knowledge of the information on which the allegations are based, and (2) have voluntarily provided such information to the government prior to filing suit. A close textual analysis combined with a review of the legislative history convinces us that under § 3730(e)(4)(A) there is an additional requirement that a qui tam plaintiff must meet in

> order to be considered an 'original source,' namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which suit is based.

912 F.2d at 16. This additional requirement in no way changes the court's conclusion that the relators were not an original source. The only way that this additional requirement might change the court's conclusion is if the record before the court establishes that the relators were the original source of the information within the meaning of Section 3730(e)(4)(B). They were not.

The relators further assert that, for strategic reasons they did not disclose the full extent of the documentary evidence in their possession at the time defendant's Motion to Dismiss. Attached to this Motion for Reconsideration is another declaration executed by William Devlin. However, this newly provided information is no different than that provided to the court by the relators in connection with the Motion to Dismiss. Therefore, this information in no way causes the court to reconsider its ruling.

ACCORDINGLY, IT IS SO ORDERED that the plaintiffs' Motion for Reconsideration is denied. IT IS

FURTHER ORDERED that oral argument set for September 7, 1993 is vacated.

Dated: September 2, 1993

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE